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6 UNITED STATES DISTRICT COURT

7 DISTRICT OF NEVADA

8 DANIEL GEORGE GRAVELLE,

Case No. 3:19-cv-00589-LRH-WGC

9 Petitioner,

10 v. **ORDER**

11 STATE OF NEVADA,

12 Respondent.

13 This habeas matter under 28 U.S.C. § 2254 comes before the Court on a *sua sponte* inquiry  
14 as to whether the petition is subject to dismissal as completely unexhausted. This order follows  
15 upon a prior Order to Show Cause (“OSC”) (ECF No. 3) and Petitioner Daniel George Gravelle’s  
16 Response (ECF No. 5) thereto. For the reasons discussed below, the Court dismisses this action  
17 without prejudice for a failure to exhaust his claims in state court.

18 Gravelle challenges a conviction and sentence imposed by the Fourth Judicial District  
19 Court for Elko County (“state court”). (ECF No. 6-1 at 1–2 (citing *State of Nevada v. Daniel*  
20 *George Gravelle*, Case No. CR-FP-15-0934).) A jury found him guilty of possession of a firearm  
21 by a person convicted of a felony offense. (*Id.* at 21.) In March 2016, the state court entered a  
22 judgment of conviction and sentenced Gravelle to 24–60 months in the custody of the Nevada  
23 Department of Corrections. (*Id.* at 26, 34–37.) However, the sentence was suspended and Gravelle  
24 was placed on probation for 60 months. (*Id.* at 44.) In February 2019, he was charged with a  
25 probation violation. (*Id.* at 29–30.) The state court conducted an evidentiary hearing in March  
26 2019 and revoked his probation; thus, the suspended sentence was executed. (*Id.* at 31, 44–46.)

1       On or before September 23, 2019, Gravelle initiated this habeas matter. (ECF No. 1.) His  
2 original habeas petition (ECF No. 1-1) and amended petition (ECF No. 6-1) state that he did not  
3 file a direct appeal to the Nevada appellate courts regarding his conviction and he has not  
4 previously filed any petitions, applications, or motions with respect to this judgment in any state  
5 or federal court. The Court entered the OSC on October 1, 2019, requiring Gravelle to show cause  
6 in writing “why this action should not be dismissed without prejudice because of his failure to  
7 exhaust his claims in state court,” and noting that his “showing must be factually detailed, and  
8 must, where possible, be supported by exhibits.” (ECF No. 3 at 5.) The Court further ordered him  
9 to file an amended petition and resolve the filing fee by either submitting a federal application to  
10 proceed *in forma pauperis* (“IFP”) or pay the \$5 filing fee. Gravelle filed a response to the OSC,  
11 IFP application and amended petition on October 16, 2019. (ECF Nos. 5–6.)

12       Under 28 U.S.C. § 1914(a) and the Judicial Conference Schedule of Fees, a \$5.00 filing  
13 fee is required to initiate a habeas action in a federal district court. The Court may authorize a  
14 person to begin an action without prepaying fees and costs if the person submits an IFP application  
15 on the approved form along with the appropriate supporting documentation. *See* 28 U.S.C.  
16 § 1915(a); LSR 1-1, LSR 1-2. Although Gravelle submitted the required form and supporting  
17 documents, the Court denies his IFP application based on the exhaustion defect explained in this  
18 order and resulting dismissal of his amended petition.

19       The amended petition (ECF No. 6-1) alleges three grounds for relief: (1) violation of Sixth  
20 and Fourteenth Amendment rights to effective assistance of counsel and due process, (2) violation  
21 of Fourth and Sixth Amendment rights to effective assistance of counsel and protection against  
22 unlawful search and seizure, and (3) violation of Sixth and Fourteenth Amendment rights to court  
23 access and due process.

24       Gravelle’s OSC response contends that his attorneys deprived him of the opportunity to  
25 appeal his 2015 conviction by failing to properly consult with him about filing a direct appeal of  
26 his sentence. Trial counsel filed a notice of withdrawal after the jury trial and Gravelle was  
27 appointed new counsel for sentencing. He claims neither attorney advised him about filing an

1 appeal, and argues this was *per se* ineffective assistance of counsel. He believes the issue of  
2 prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), “could be resolved in a different  
3 manner from the one followed by the district court.”

4 The Court finds that the amended petition is subject to immediate dismissal because it is  
5 completely unexhausted. Pursuant to 28 U.S.C. § 2254(b)(1)(A), a state prisoner seeking habeas  
6 corpus relief in federal court must first exhaust available state court remedies before presenting his  
7 claims in the federal court. The exhaustion requirement ensures that the state courts, as a matter  
8 of federal-state comity, will have the first opportunity to pass upon and correct alleged violations  
9 of federal constitutional guarantees. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). To satisfy  
10 the exhaustion requirement, a petitioner must fully and fairly present his claims to the state courts.  
11 *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014). A claim must be raised through one  
12 complete round of either direct appeal or collateral proceedings to the highest state court level of  
13 review available. *O’Sullivan v. Boerckel*, 526 U.S. 838, 844–45 (1999); *Peterson v. Lampert*, 319  
14 F.3d 1153, 1156 (9th Cir. 2003) (en banc). A petition that is completely unexhausted is subject to  
15 immediate dismissal without further advisements or proceedings. *See, e.g., Rasberry v. Garcia*,  
16 448 F.3d 1150, 1154 (9th Cir. 2006); *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir. 2001).

17 Grounds one and two of the amended petition are based upon claims of ineffective  
18 assistance of counsel (“IAC”). Although Gravelle includes additional allegations of a denial of  
19 due process and unlawful search and seizure, these claims are grounded in operative factual  
20 allegations asserting that IAC violated Gravelle’s constitutional rights. IAC claims are not  
21 considered on direct appeal under Nevada state practice. Rather, IAC claims are raised and  
22 considered in state petitions for writ of habeas corpus seeking post-conviction relief. *See generally*  
23 NRS Chapter 34, Writs: Certiorari, Mandamus, Prohibition, Habeas Corpus. The Nevada Supreme  
24 Court has affirmed that “[IAC] claims are properly raised for the first time in a timely first post-  
25 conviction petition.” *Pellegrini v. State*, 117 Nev. 860, 882, 34 P.3d 519, 534 (2001); *see also*  
26 *Williams v. Crawford*, 669 F. App’x 846, 847 (9th Cir. 2016) (noting that, because “state habeas  
27 proceedings are the ‘initial review proceedings’ for claims of ineffective assistance of trial and

1 appellate counsel in Nevada,” petitioner “effectively was required to bring his claims in those  
2 proceedings). Gravelle does not allege that he has filed a state habeas petition, nor does the state  
3 court’s docket reflect the filing of a state habeas petition (ECF No. 6-1 at 21–33). Thus, his IAC  
4 claims are unexhausted.

5 Ground three alleges a denial of due process and access to the courts based on the state  
6 court’s April 2019 denial of free trial transcripts. Gravelle acknowledges that this claim could not  
7 have been raised on direct appeal because it had yet to occur. (*Id.* at 6–7.) However, he provides  
8 no reason for failing to exhaust his claim through state habeas proceedings.

9 At most, Gravelle’s response suggests that he could not exhaust state remedies because  
10 counsel was ineffective in failing to advise him regarding a *direct appeal*, and their failure rendered  
11 state corrective process unavailable. This argument misses the mark. Even after the Nevada  
12 statute of limitations expired,<sup>1</sup> Gravelle at any time could have filed a state habeas petition and  
13 sought to establish good cause for his failure to file timely petition. If that petition ultimately were  
14 denied as untimely, through to a completed appeal from denial of the petition in the state appellate  
15 courts, Gravelle still would have exhausted his IAC claims through available state court procedure.  
16 Gravelle instead brings a federal habeas petition without ever presenting his habeas claims to  
17 Nevada courts.<sup>2</sup> Gravelle’s failure to file a state habeas petition stands as the only reason for his  
18 failure to exhaust his claims through available state procedure. In short, state corrective process  
19 was available, but Gravelle simply did not invoke it.

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23       <sup>1</sup> Although the state court docket indicates that Gravelle is now serving his suspended sentence because his  
24 probation was revoked, Gravelle appears to challenge the underlying judgment of conviction since nothing  
25 in the amended petition mentions the revocation. (ECF No. 6-1 at 1–9.) NRS 34.726(1) provides that a  
26 state habeas petition challenging the validity of a judgment of conviction must be filed within one year of  
27 the judgment becoming final. Thus, in the absence of a direct appeal, Gravelle’s judgment became final in  
April 2016, and a state habeas petition was due in April 2017.

28       <sup>2</sup> The Court notes that federal habeas petitions are also subject to a one-year statute of limitations under the  
Antiterrorism and Effective Death Penalty Act (“AEDPA”), 28 U.S.C. § 2244(d)(1).

1           **IT THEREFORE IS ORDERED:**

2           1. Petitioner Daniel George Gravelle's Amended Petition for Writ of Habeas Corpus  
3           (ECF No. 6-1) is DENIED without prejudice as unexhausted.

4           2. Gravelle's Application to Proceed *In Forma Pauperis* (ECF No. 6) is DENIED.

5           3. A certificate of appealability is DENIED as jurists of reason would not find the Court's  
6           dismissal of the petition as completely unexhausted to be debatable or wrong.

7           4. Pursuant to Rule 4 of the Rules Governing Section 2254 Cases, the Clerk of Court will  
8           add Nevada Attorney General Aaron D. Ford as counsel for Respondents and  
9           informally serve the Nevada Attorney General by directing a notice of electronic filing  
10           of this order to his office. No response is required from Respondents other than to  
11           respond to any orders of a reviewing court.

12           5. The Clerk of Court is further directed to enter final judgment accordingly, dismissing  
13           this action without prejudice, and close this case.

14           DATED this 22<sup>nd</sup> day of Oct. 2019.

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17           LARRY R. HICKS  
18           UNITED STATES DISTRICT JUDGE